

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

APRIL TERM, 1937.

No. 6975

16

GEORGE MEYERSON, APPELLANT,

vs.

W. D. HURLBUT, AND AHLBERG BEARING CO.
PANY, A CORPORATION,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED MAY 25, 1937

PRINTED JULY 6, 1937

United States Court of Appeals for the District of Columbia

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vs.

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United States Court of Appeals for the District of Columbia

a. In the District Court of the United States
For the District of Columbia

At Law No. 88355

GEORGE MEYERSON, *Plaintiff*,

vs.

W. D. HURLBUT, and AHLBERG BEARING COMPANY, a Corpo-
ration, *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
cause, to wit:—

1

Declaration

Filed December 14 1936

In the District Court of the United States for the
District of Columbia

At Law No. 88355

GEORGE MEYERSON, 1830-14th Street, N. W., Washington,
D. C., *Plaintiff*,

vs.

W. D. HURLBUT, and AHLBERG BEARING COMPANY, a Corpo-
ration, 1409 S Street, N. W., Washington, D. C., *Defen-
dants*.

First Count

The plaintiff, George Meyerson, by his attorney, Maurice
Friedman, sues the defendants, the Ahlberg Bearing Com-
pany, a corporation, and W. D. Hurlbut, for that heretofore,

to wit, on the 20th day of February, 1936, and for a long time prior thereto, the defendant, the Ahlberg Bearing Company was and still is a corporation, duly incorporated under and by virtue of the laws of the State of Illinois, and doing business in the City of Washington, District of Columbia, and having a branch office and general manager in said City and District, and that whereas the defendant, W. D. Hurlbut, was on said date and for a long time prior thereto, and still is, the general manager of said branch office of said defendant, Ahlberg Bearing Company, in the City of Washington, District of Columbia, having exclusive control of said branch office in the said City and District; that the plaintiff had for a long time prior to the time of the committing of the grievances hereinafter mentioned been engaged in the District of Columbia, Virginia and Maryland in the trade or business of buying and selling parts for passenger and commercial vehicles and trading

as Replacement Parts Service; and that whereas the
2 said plaintiff now is a true, honest, just and faithful citizen of the United States, and a resident of the District of Columbia, and as such has always behaved and conducted himself; that the said plaintiff, prior to the committing of the grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed and accepted by his customers, trade and others engaged in the same or similar business to be a person of good name, fame, credit, and reputation, and bore a reputation for ethical and fair business practices, and good credit; yet, the defendants well knowing the premises but contriving and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and credit, and to bring him into public scandal, infamy and disgrace, and to injure the said plaintiff in his said business, name, fame, credit and reputation, and to cause to be suspected and believed that the plaintiff was guilty of unfair and unethical trade practices, and that the said plaintiff had been refused credit from various jobbers from whom the said plaintiff purchased goods, wares and merchandise for use and resale in the plaintiff's business, and that various jobbers had refused to sell to the plaintiff goods, wares and merchandise for use and resale in his said business, and that plaintiff had been buying merchandise from various jobbers in the District of Columbia

and reselling the same below plaintiff's cost in order to retain the plaintiff's customers and business, and that plaintiff was cutting prices to any garage, fleets, or dealers, and to oppress and ruin him, the defendant, Ahlberg Bearing Company, heretofore, to wit, on or about the 20th day of February, 1936, did, among other things, through its agent and general manager, the said defendant, W. D. Hurlbut, utter, speak and say the following false, malicious, scandalous and defamatory words of and concerning the plaintiff in

3 relation to his said trade, business, or profession, and of and concerning the plaintiff's mode of conducting the same, in the presence of at least one person, without any reasonable or probable cause so to do, that is to say:

"George Meyerson (meaning plaintiff) has been cutting prices to any garages, fleets or dealers," (Meaning thereby that the plaintiff, trading as Replacement Parts Service, was guilty of unfair and unethical trade practices and competition in that he cut his prices below that of other like business houses and that plaintiff's customers and trade were not dealt with fairly and ethically and according to the generally accepted practices of the business.)

"George Meyerson (meaning plaintiff) has been buying merchandise from jobbers in the District and reselling below cost, just to hold the business." (Meaning thereby that plaintiff was guilty of unethical and unfair competition and practiced what is sometimes called "cutthroat competition" or "chiseling" in order to retain his trade, and to gain trade and customers from other competitors by unethical and unfair means.)

"Various Washington jobbers have cut Meyerson (meaning plaintiff) off on Open Account Basis." (Meaning thereby that plaintiff was unable to purchase merchandise for his said business on a credit basis, and that plaintiff's business and credit reputation was such that credit had been refused him by various Washington jobbers.)

"Various Washington jobbers have refused to sell merchandise to George Meyerson (meaning plaintiff)." (Meaning thereby that plaintiff was guilty of unethical and unfair trade practices and his reputation was such that various Washington jobbers had refused to sell plaintiff merchandise to be used and resold in his business);

That the defendant, Ahlberg Bearing Company,
4 through its agent and general manager, the said
defendant, W. D. Hurlbut, meaning and intending to
mean by the aforesaid slanderous statements, and being by
the customers, trade and others in like or similar business
to whom the plaintiff was known, understood to mean, state,
charge and insinuate that the plaintiff was guilty of fraud-
ulent, unethical and unfair practices in his said trade or
business, that the plaintiff was cutting prices to any garage,
fleets or dealers, that the plaintiff had been buying merchan-
dise from various jobbers and reselling below cost in order
to retain business and to gain customers and business from
other competitors by unfair and unethical trade practices,
that the plaintiff's credit was bad and that various Wash-
ington jobbers had cut him off on Open Account Basis, and
that various Washington jobbers had refused to sell the
plaintiff any merchandise; all of which were false, were
known to the defendants to be false when they were uttered,
and that they were uttered for the purpose of injuring and
ruining the plaintiff, and to prevent him from continuing
the Replacement Parts Service business in the District of
Columbia and elsewhere, in which he was at that time en-
gaged, and had been for some time engaged, and to prevent
the person or persons in whose hearing the above state-
ments were made from continuing doing business with the
plaintiff, and to continue their business relations with the
defendant, Ahlberg Bearing Company; by means of which
the plaintiff has suffered great mental pain and anguish
and has been greatly injured and damnified, and by reason
of said false, malicious, scandalous statements so uttered as
aforesaid, the said plaintiff has been injured in his business,
and has been brought into public scandal and disgrace and
held up to public ridicule, hatred and contempt with and
among his trade, customers and competitors and others in
like or similar business in the District of Columbia
5 and elsewhere in the United States, by reason of the
publication of and circulation of the scandalous,
false, malicious and defamatory words and language, all to
the damage of the said plaintiff in the sum of twenty-five
thousand dollars (\$25,000), which amount he claims of the
said defendants, besides the costs of this suit.

WHEREFORE, the plaintiff brings this suit and claims of the said defendants the sum of twenty-five thousand dollars (\$25,000) besides costs.

Second Count

The plaintiff, George Meyerson, by his attorney, Maurice Friedman, sues the defendants, the Ahlberg Bearing Company, a corporation, and W. D. Hurlbut, for that heretofore to wit, on the 20th day of February, 1936, and for a long time prior thereto, the defendant, the Ahlberg Bearing Company was and still is a corporation, duly incorporated under and by virtue of the laws of the State of Illinois, and doing business in the City of Washington, District of Columbia, and having a branch office and general manager in said City and District, and that whereas the defendant, W. D. Hurlbut, was on said date and for a long time prior thereto, and still is, the general manager of said branch office of said defendant, Ahlberg Bearing Company, in the City of Washington, District of Columbia, having exclusive control of said branch office in the said City and District; that the plaintiff had for a long time prior to the time of the committing of the grievances hereinafter mentioned been engaged in the District of Columbia, Virginia and Maryland in the trade or business of buying and selling parts for passenger and commercial vehicles and trading as Replacement Parts Service; and that whereas the said plaintiff now is a true, honest, just and faithful citizen of the United States, and a resident of the District of Columbia, and as such has always behaved and conducted himself; that the said plaintiff, prior to the committing of the grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed and accepted by his customers, trade and others engaged in the same or similar business to be a person of good name, fame, credit and reputation, and bore a reputation for ethical and fair business practices, and good credit; yet, the defendants well knowing the premises but contriving and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and credit, and to bring him into public scandal, infamy and disgrace, and to injure the said plaintiff in his said business, name, fame, credit and reputation, and to

cause to be suspected and believed that the plaintiff was guilty of unfair and unethical trade practices, and that the said plaintiff had been refused credit from various jobbers from whom the said plaintiff purchased goods, wares and merchandise for use and resale in the plaintiff's business, and that various jobbers had refused to sell to the plaintiff goods, wares and merchandise for use and resale in his said business, and that plaintiff had been buying merchandise from various jobbers in the District of Columbia and reselling the same below plaintiff's cost in order to retain the plaintiff's customers and business, and that plaintiff was cutting prices to any garage, fleets, or dealers, and to oppress and ruin him, the defendant, Ahlberg Bearing Company, heretofore, to wit, on or about the 22nd day of February, 1936, did among other things, through its agent and general manager, the said defendant, W. D. Hurlbut, utter, speak and say the following false, malicious, scandalous and defamatory words of and concerning the plaintiff in relation to his said trade, business, or profession, and of and concerning the plaintiff's mode of conducting the same,

7 in the presence of at least one person, other than plaintiff, without any reasonable or probable cause so to do, that is to say:

"Meyerson, (meaning plaintiff) you have been cutting prices to any garages, fleets or dealers. You are cutting prices and you know it." (Meaning thereby that the plaintiff, trading as Replacement Parts Service, was guilty of unfair and unethical trade practices and competition in that he cut his prices below that of other like business concerns and that plaintiff's customers and trade were not dealt with fairly and ethically and according to the generally accepted practices of the business.)

"I (meaning defendant, W. D. Hurlbut) said that you (meaning plaintiff) have been buying merchandise from jobbers and reselling below your (meaning plaintiff's) cost—anything to hold the business." (Meaning thereby that plaintiff was guilty of unethical and unfair competition and practiced what is sometimes called "cutthroat competition" or "chiseling" in order to retain his trade, and to gain customers and trade from other competitors by unethical and unfair means.)

“You (meaning plaintiff) have been cutting prices to the Standard Oil Company on Timken Roller Bearings.” (Meaning thereby that plaintiff was guilty of unfair and unethical trade practices by cutting prices on certain standard materials, which if true would expose plaintiff to the hazard of losing business and would cause plaintiff to be debarred from purchasing various products, for use and resale in his business, from certain well-known manufacturers, to the plaintiff’s immeasurable damage in his business.)

“Various Washington jobbers have cut you (meaning plaintiff) off on Open Account Basis.” (Meaning thereby that plaintiff was unable to purchase merchandise for
8 his said business on a credit basis, and that plaintiff’s business and credit reputation was such that credit had been refused him by various Washington jobbers.)

“Various Washington jobbers have refused to sell merchandise to you (meaning plaintiff).” (Meaning thereby that plaintiff was guilty of unethical and unfair trade practices and his reputation was such that various Washington jobbers had refused to sell plaintiff merchandise to be used and resold in his business.)

That the defendant, Ahlberg Bearing Company, through its agent and general manager, the said defendant, W. D. Hurlbut, meaning and intending to mean by the aforesaid slanderous statements, and being by the customers, trade and others in like or similar business to whom the plaintiff was known, understood to mean, state, charge, and insinuate that the plaintiff was guilty of fraudulent, unethical and unfair practices in his said trade or business, that the plaintiff was cutting prices to any garage, fleets or dealers, that the plaintiff had been buying merchandise from various jobbers and reselling below cost in order to retain business and to gain customers and business from other competitors by unfair and unethical trade practices, that the plaintiff’s credit was bad and that various Washington jobbers had cut him off on Open Account Basis, and that various Washington jobbers had refused to sell the plaintiff any merchandise; all of which were false, were known to the defendants to be false when they were uttered, and that they were uttered for the purpose of injuring and ruining the plain-

tiff, and to prevent him from continuing the Replacement Parts Service business in the District of Columbia and elsewhere, in which he was at that time engaged, and had been for some time engaged, and to prevent the person or persons in whose hearing the above statements were made from continuing doing business with the plaintiff, and to continue their business relations with the defendant, Ahlberg Bearing Company; by means of which the plaintiff has suffered great mental pain and anguish and has been greatly injured and damnified, and by reason of said false, malicious, scandalous statements so uttered as aforesaid, the said plaintiff has been injured in his business, and has been brought into public scandal and disgrace and held up to public ridicule, hatred and contempt with and among his trade, customers and competitors and others in like or similar business in the District of Columbia and elsewhere in the United States, by reason of the publication of and circulation of the scandalous, false, malicious and defamatory words and language, all to the damage of the said plaintiff in the sum of twenty-five thousand dollars (\$25,000), which amount he claims of the said defendants, besides the cost of this suit.

WHEREFORE, the plaintiff brings this suit and claims of the said defendants the sum of twenty-five thousand dollars (\$25,000) besides costs.

MAURICE FRIEDMAN
Attorney for Plaintiff.

Bill of Particulars

Filed February 15 1937

* * * * *

The plaintiff, by his attorney, for a bill of particulars to his declaration filed herein says that the utterances alleged in the first count in said declaration were made on one occasion and in the same conversation, to wit, on the 20th day of February, 1936, and that the utterances alleged in the second count in said declaration were made in a conver-

10 sation on one occasion, to wit, on the 22nd day of February, 1936.

MAURICE FRIEDMAN
Attorney for Plaintiff.

Demurrer to Declaration.

Filed February 25 1937

* * * * *

The defendants, W. D. Hurlbut and Ahlberg Bearing Company, say that the first count and the second count of the Declaration are bad in substance.

DEAN HILL STANLEY
Attorney for Defendants

Matters of Law Intended to be Argued.

1. Neither the utterances alleged in the first count to have been made concerning the plaintiff, nor the utterances alleged in the second count to have been made concerning the plaintiff are slanderous.

2. The words alleged in both counts of the Declaration to have been uttered concerning the plaintiff are not subject in and of themselves to a slanderous meaning, and there is nothing in the inducement in either count of the Declaration disclosing extrinsic facts or circumstances, which, coupled with the words uttered, render them actionable.

3. The innuendoes alleged in respect of each of the alleged utterances in each count attempts to enlarge the sense of the alleged utterances and to read into the utterances meanings which go far beyond the natural import of the words.

4. None of the alleged utterances in either count is
11 actionable *ex vi termini*.

5. None of the alleged utterances in either count are slanderous *per se*. No special damages having been averred in either count, the allegations of neither count state a cause of action.

6. Neither the allegations of the first count nor the allegations of the second count set forth facts sufficient to constitute a cause of action.

DEAN HILL STANLEY
Attorney for Defendants

District Court of the United States for the
District of Columbia

Wednesday, April 14, 1937.

Session resumed pursuant to adjournment, Hon. Daniel W. O'Donoghue, Justice, presiding.

* * * * *

Upon consideration of the demurrer filed herein, to the declaration, it is ordered that said demurrer be, and the same is hereby sustained, with leave to amend within ten days hereof.

To the foregoing order an exception is duly noted and allowed.

Thursday, April 22, 1937.

Session resumed pursuant to adjournment, Hon. Daniel W. O'Donoghue, Justice, presiding.

* * * * *

Comes now the plaintiff by his attorney of record and elects to stand upon his declaration filed herein, and it appearing to the Court that a demurrer to said declaration was sustained upon the 14th day of April, 1937, with
12 leave to amend within ten days, judgment is ordered in accordance therewith.

Wherefore, it is considered that plaintiff take nothing by this action that defendants go hence without day, be for nothing held and recover of plaintiff their costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiff by his attorney of record, in open Court, notes an appeal to the United States Court of Appeals for the District of Columbia; whereupon an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum

April 30-1937.

\$50. cash deposited in lieu of bond on appeal.

Assignment of Errors

Filed May 3 1937

* * * * *

Comes now the plaintiff, George Meyerson, by his attorney, and assigns as error in the above-entitled case the following:

1. The Court erred in ruling that the alleged slanderous utterances contained in the Declaration were not slanderous *per se*.

2. The Court erred in refusing to overrule the demurrer to the Declaration.

3. The Court erred in sustaining the demurrer to the Declaration.

13 4. The Court erred in other respects apparent of record.

MAURICE FRIEDMAN

Attorney for Plaintiff.

C LEO DeORSEY

Of Counsel.

SERVICE of a copy of the above Assignment of Errors acknowledged this 3rd. day of May, 1937.

DEAN HILL STANLEY

B.

Attorney for Defendants

Designation of Record

Filed May 3 1937

* * * * *

Comes now the plaintiff, George Meyerson, by his attorney of record and designates the parts of the record which he desires to have included in the transcript of record in this case on appeal, said parts being considered sufficient for determination of the questions on appeal, and respectfully requests the Clerk of the Court to prepare the transcript of record on appeal to the United States Court of Appeals for the District of Columbia and to include therein the following:

1. December 14, 1936, Declaration.
2. February 15, 1937, Bill of Particulars.
3. February 25, 1937, Demurrer to Declaration; Matters of Law Intended to Be Argued.
4. April 14, 1937, Memorandum: Demurrer to Declaration sustained. Exception noted. 10 days to amend.
5. April 22, 1937, Memorandum: Plaintiff elects to stand on Declaration. Judgment for defendants against plaintiff for costs. Appeal noted. Bond fixed at \$100 or deposit of \$50.00 cash.
- 14 6. April 30, 1937, Memorandum: Perfection of appeal. Deposit of \$50.00 cash in lieu of bond.
7. May 3, 1937, Assignment of Errors.
8. May 3, 1937, This Designation of Record.

MAURICE FRIEDMAN
Attorney for Plaintiff.

C LEO DeORSEY
Of Counsel.

SERVICE of copy of the above Designation of Record acknowledged by me this 3rd. day of May, 1937.

DEAN HILL STANLEY
B.
Attorney for defendants.

15 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 88355 at Law, wherein George Meyerson is Plaintiff and W. D. Hurlbut and Ahlberg Bearing Company, a corporation, are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my

name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of May, 1937.

CHARLES E STEWART,

Clerk.

(Seal)

By CHAS B COFLIN,

Assistant Clerk.

Endorsed on Cover: No. 6975 George Meyerson, Appellant, vs. W. D. Hurlbut, and Ahlberg Bearing Company, a Corporation. United States Court of Appeals for the District of Columbia Filed May 25 1937 Moncure Burke, Clerk

FILED SEP 10 1937

Monroe Burke

CLERK

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

No. 6975.

GEORGE MEYERSON, *Appellant*,

v.

W. D. HURLBUT, and AHLBERG BEARING COMPANY, a
corporation, *Appellees*.

BRIEF FOR APPELLANT.

MAURICE FRIEDMAN,
Attorney for Appellant.

C. LEO DEORSEY,
Of Counsel.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

No. 6975.

GEORGE MEYERSON, *Appellant*,

v.

W. D. HURLBUT, and AHLBERG BEARING COMPANY, a
corporation, *Appellees*.

BRIEF FOR APPELLANT.

STATEMENT.

The plaintiff in the court below seeks damages of the defendants for having uttered false and slanderous statements concerning the plaintiff in his trade or business.

The statements which the defendants uttered are to the effect that the plaintiff had been cutting prices to any garages, fleets or dealers; that he had been buy-

ing merchandise from jobbers in the District and reselling below cost just to hold the business; that various Washington jobbers had cut the plaintiff off on an Open Account Basis; that various Washington jobbers had refused to sell merchandise to the plaintiff. (Rec. p. 3)

The above statements are in substance repeated in the second count of the declaration and in addition thereto the second count sets forth that the defendants made the additional statement that the plaintiff had been cutting prices to the Standard Oil Company on Timken Roller Bearings. (Rec. pp. 6-7) The statements uttered by the defendants in the first count occurred in one conversation on about February 20, 1936, and the statements uttered in the second count were made in another conversation on or about the 22nd day of February, 1936. (Rec. pp. 8-9)

The declaration is in the usual form and sets forth that the plaintiff prior to the date of the alleged grievances was in the business of buying and selling parts for passenger and commercial vehicles and had always enjoyed a good name, fame, credit and reputation for ethical and fair business practices and good credit in his business; that the defendants maliciously and without probable cause, intending to injure the plaintiff in his business, name, fame and credit and to cause it to be suspected and believed that the plaintiff was guilty of unfair and unethical trade practices, and that the plaintiff had been refused credit from jobbers from whom he purchased goods and merchandise for his business, and that jobbers had refused to sell goods to the plaintiff for use in his business, and that the plaintiff was buying merchandise and reselling it below his cost in order to retain his customers and business, and

that the plaintiff was cutting prices to garages, fleets and dealers, uttered the statements mentioned above concerning the plaintiff in his trade, business or profession, knowing that these statements were false and made them for the purpose of injuring the plaintiff in his business, as well as to entice away the plaintiff's customers. (Rec. pp. 1-8)

The defendants demurred to the declaration (Rec. p. 9) and in support of their demurrer, argued that the utterances set forth in each of the counts are not slanderous *per se*; that the utterances are not subject in and of themselves to a slanderous meaning and there is nothing in the inducement disclosing extrinsic facts or circumstances, which, coupled with the words uttered, render them actionable; that the innuendoes attempt to enlarge the sense of the utterances and to read into the utterances meanings which go far beyond the natural import of the words; that none of the utterances is actionable *ex vi termini*; that the allegations of neither count state a cause of action because no special damages had been averred; that the allegations in the declaration do not set forth facts sufficient to constitute a cause of action.

On behalf of the plaintiff below, it was urged (1) that each of the counts sets forth a cause of action which is slanderous *per se* and (2) that the utterances in each count are susceptible of a slanderous meaning and should be submitted to a jury.

The demurrer was sustained by the court below and the plaintiff elected to stand upon the declaration. Judgement was ordered for the defendants. The plaintiff noted an appeal in open court (Rec. p. 10) and the case is here on that appeal.

ASSIGNMENT OF ERRORS.

1. The Court erred in ruling that the alleged slanderous utterances contained in the Declaration were not slanderous *per se*.

2. The Court erred in refusing to overrule the demurrer to the Declaration.

3. The Court erred in sustaining the demurrer to the Declaration.

4. The Court erred in other respects apparent of record.

QUESTIONS INVOLVED.

I. The utterances set forth in each of the counts of the declaration concerning the plaintiff in his business, trade or profession are slanderous *per se*.

II. The utterances set forth in each of the counts of the declaration concerning the plaintiff in his business, trade or profession are susceptible of a slanderous meaning and should be submitted to a jury.

ARGUMENT.

I. The Utterances Are Slanderous Per Se.

It is the contention of the plaintiff that the utterances in each of the counts of the declaration concerning the plaintiff in his trade, business or profession are slanderous *per se*. In both counts the statements are, in substance, that the plaintiff had been cutting prices to any garages, fleets or dealers; that he had been buying merchandise from jobbers in the District and reselling below his cost just to hold the business; that various Washington jobbers have cut the plaintiff off on an Open Account Basis; that various Washington jobbers have refused to sell merchandise to the

plaintiff. In addition to the foregoing the second count contains the utterance made by the defendants to the effect that the plaintiff had been cutting prices to the Standard Oil Company on Timken Roller Bearings.

Appropriate innuendoes for each of the utterances are set forth in the declaration giving the reasonable and ordinary meaning and interpretation of these statements. These innuendoes will be discussed under the second question.

By the demurrer to the declaration, the defendants necessarily admitted the truth of the facts stated in the declaration in so far as they are well pleaded, including the allegations of falsehood and want of probable cause (*Nalle v. Oyster*, 230 U. S. 165). These facts are that the plaintiff was in the business of buying and selling parts for passenger and commercial vehicles and prior to the grievances mentioned had always enjoyed a good reputation in his business as well as good credit and a reputation for fair and ethical trade practices in the conduct of his business and that the defendants, knowing the statements to be false and intending to injure the plaintiff's credit in the community, and to injure the plaintiff's reputation for ethical and fair business practices and the mode in which he conducted his business, uttered the statements set forth above.

It is a well established principle of law that statements concerning a person, tending to injure him in his business, trade or profession are slanderous *per se*. It is likewise well established that where the slander or libel relates to a person's business so as to affect the confidence of the public and drives away his customers, or where the libel or slander affects his credit in the community and weakens the public confidence

so that it is more difficult to obtain credit, borrow money, or so that his reputation in such a business is injured thereby, then the statements are libelous or slanderous *per se*. It must be remembered that this is not the ordinary case of slander, since the utterances concerned the plaintiff in his business, trade or profession. Words spoken of a person in his trade or business will bear an action that will not be actionable in the case of another person.

Newell on Slander and Libel (4th Edition—1924) at page 51 defines the rule as follows:

“Any written words are libelous which impeach the credit of any merchant or trader by imputing to him bankruptcy, insolvency, or even embarrassment, either past, present or future, or which impute to him fraud, or dishonesty or any *mean and dishonorable trickery in the conduct of his business, or which in any other manner are prejudicial to him in the way of his employment or trade.* ‘The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person; * * * ’ (Italics ours)

Again at page 185 the following rule is stated:

“Of merchants, tradesmen and others in occupations where credit is essential to the successful prosecution, any language is actionable without proof of special damages which imputes a want of credit or responsibility or insolvency; and generally it may be said of all persons who carry on any trade recognized by law, or are engaged in any lawful employment, however humble, an action lies for any words falsely and maliciously spoken which prejudice them in the way of such trade or employment, provided the words are

spoken of and concerning such trade or employment, and 'touch' them therein."

In the case of *Washington Post Company v. O'Donnell* (43 App. D. C. 215) at page 239 it is said:

"Defamatory words, falsely spoken, which prejudice a party in his business, trade, or profession, are actionable *per se*". (Citing Cases)

(See also: *Seawell v. A. S. Abell Company*, 34 W. L. R. 195)

Taking the utterances as a whole, it is plain to see that the ordinary and reasonable meaning of these statements coupled with the preceding allegations in the declaration, is that the plaintiff had been unable to obtain credit, that various jobbers had refused to sell him merchandise and that his method of conducting his business or trade has been unfair, untrustworthy, dishonest and unethical. This is emphasized by the fact that the defendants made these statements for the purpose of injuring him in his trade or business and also for the purpose of preventing those persons in whose hearing the statements were made from continuing to do business with the plaintiff. The only reasonable and just conclusion is that the statements are slanderous *per se* and would naturally tend to injure the plaintiff in his trade or business.

In addition, the declaration states, and it is admitted by the defendants' demurrer, that it was understood by these utterances that the plaintiff had been unable to purchase merchandise for his business on a credit basis; that the plaintiff's business and credit reputation was such that he had been refused credit by various jobbers, and the imputation of insolvency or in-

ability to pay his debts is very plain. It was also understood by the statement that various jobbers had refused to sell the plaintiff merchandise when taken in connection with the statement that plaintiff had been cutting prices to any garages, fleets or dealers, that the plaintiff had been guilty of unethical and unfair trade practices and his mode of conducting his business was such as resulted in the refusal of various Washington jobbers to sell merchandise to the plaintiff for use in his business.

If we are to consider the effect and tendency of the language used rather than their form as the criterion by which to determine their defamatory meaning, we must irresistibly conclude that the statements concerning the plaintiff are slanderous *per se*. (36 C. J. 1153)

The cases are numerous to the effect that where the words are such as to affect a man's credit or reputation in his business they are actionable *per se* without proof of special damages.

Holtz v. National Furniture Company (61 App. D. C. 80, 81)

It will be seen that if in the *Holtz case, supra*, the alleged statement had concerned the plaintiff *in his business or trade*, then this Court would have held a cause of action to have been stated. There can be no question therefore but that the utterances with which we are concerned in the case at bar must be held to be slanderous *per se* since it tends to injuriously affect the plaintiff in his trade or business.

See also: *Cohen v. Marx Jewelry Company, et al.*, 65 W. L. R. 827, decided July 12, 1937.

The meaning of the words "open account" is unambiguous. It is said that an open account is a run-

ning or unsettled account; not completely settled, but subject to future adjustment. (*Sheppard v. Wilkins*, 1 Ala. 62; *Dolhonde v. Laurans*, 21 La. Ann. 406; *Purvis v. Kroner*, 18 Or. 414, 23 Pac. 260)

One of the definitions given for "credit" is: "the time allowed by the creditor for the payment of goods sold by him to the debtor". (*Bouvier's Law Dictionary*—Rawle's Third Revision—Volume 1, page 725)

The word "credit", therefore, must be taken as synonymous with the words "open account" as used in the statements set forth in the declaration concerning the plaintiff. It will, therefore, be seen that the obvious meaning of the statement, made by the defendants concerning the plaintiff, that various Washington jobbers had refused to sell the plaintiff merchandise on an open account basis is, that these jobbers had refused to extend credit to the plaintiff or had refused to sell plaintiff on a time basis. In other words the defendants meant that jobbers had refused to sell the plaintiff on the basis of a running or unsettled account subject to future adjustment because of the fact that the plaintiff could not pay his just debts or because he was untrustworthy and unreliable in the settlement of his accounts where credit had been extended him.

It is, therefore, respectfully submitted that the logical and reasonable meaning of the words used by the defendants concerning the plaintiff in his trade or business is such as would tend to injure and affect the credit and reputation of the plaintiff in his trade, business or profession and that the utterances are slanderous *per se*. The judgment of the court below in sustaining the demurrer to the declaration should therefore be reversed.

II. The Utterances Made by the Defendants Concerning the Plaintiff in His Trade or Business Are Susceptible of a Slanderous Meaning.

The statements made by the defendants concerning the plaintiff in the first count together with the innuendoes (Rec. p. 3) are as follows:

“George Meyerson (meaning plaintiff) has been cutting prices to any garages, fleets or dealers.” (Meaning thereby that the plaintiff, trading as Replacement Parts Service, was guilty of unfair and unethical trade practices and competition in that he cut his prices below that of other like business houses and that plaintiff’s customers and trade were not dealt with fairly and ethically and according to the generally accepted practices of the business.)

“George Meyerson (meaning plaintiff) has been buying merchandise from jobbers in the District and reselling below cost, just to hold the business.” (Meaning thereby that plaintiff was guilty of unethical and unfair competition and practiced what is sometimes called “cutthroat competition” or “chiseling” in order to retain his trade, and to gain trade and customers from other competitors by unethical and unfair means.)

“Various Washington jobbers have cut Meyerson (meaning plaintiff) off on Open Account Basis.” (Meaning thereby that plaintiff was unable to purchase merchandise for his said business on a credit basis, and that plaintiff’s business and credit reputation was such that credit had been refused him by various Washington jobbers.)

“Various Washington jobbers have refused to sell merchandise to George Meyerson (meaning plaintiff).” (Meaning thereby that plaintiff was guilty of unethical and unfair trade practices and his reputation was such that various Washington jobbers had refused to sell plaintiff merchandise to be used and resold in his business.)

The utterances contained in the second count of the declaration together with the innuendoes (Rec. pp. 6-7) are practically identical with those contained in the first count. The additional slanderous statement uttered by defendants is as follows:

“You (meaning plaintiff) have been cutting prices to the Standard Oil Company on Timken Roller Bearings.” (Meaning thereby that plaintiff was guilty of unfair and unethical trade practices by cutting prices on certain standard materials, which if true would expose plaintiff to the hazard of losing business and would cause plaintiff to be debarred from purchasing various products, for use and resale in his business, from certain well-known manufacturers, to the plaintiff’s immeasurable damage in his business.)

The inference or the meaning of these utterances concerning the plaintiff in this particular case is clear. These statements accuse him of unfair and unethical trade practices and competition and not in accordance with the generally accepted practices of the business and are used in such a way as to infer that the plaintiff practiced a “cutthroat” and “chiseling” method in his business and that the plaintiff had been refused credit and that his methods of conducting his business were unethical and unfair and resulted in the refusal of jobbers to sell him merchandise. In addition, he is accused of cutting prices on certain standard materials, which if true, would result in plaintiff being unable to purchase merchandise from certain manufacturers.

It is a well recognized and settled principle of law that where words are susceptible of more than one meaning one of which may be slanderous and the other

not, it would be for the jury to say, under all the circumstances, which of the two meanings is attributable to those statements by those to whom the statements are addressed.

Lane v. Washington Daily News (66 App. D. C. 245)

Washington Times Company v. Murray (55 App. D. C. 32, 299 Fed. 903)

Washington Herald Company v. Berry (41 App. D. C. 322)

Washington Post Company v. Chaloner (250 U. S. 290).

In the case of *Baker v. Warner* (231 U. S. 588) at page 594 it is said:

“Where words are libelous *per se* the Judge can so instruct the jury, leaving to them only the determination of the amount of damages. Where the words are not libelous *per se* and, in the light of the extrinsic facts averred could not possibly be construed to have a defamatory meaning, the Judge can dismiss the declaration on demurrer, or, during the trial, may withdraw the case from the jury. But there is a middle ground where though the words are not libelous *per se*, yet, in the light of the extrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact. In that class of cases the jury must not only determine the existence of the extrinsic circumstances, which it is alleged bring to light the concealed meaning, but they must also determine whether those facts when coupled with the words, make the publication libelous. *Van Vechten v. Hopkins*, 5 Johns 219. The meaning of the words was in dispute, and as that issue of fact was not submitted to the triers of fact, a new trial must be ordered.”

In the case of *Belknap v. Ball* (83 Mich. 583, 11 L. R. A. 72) the defendant had published of a candidate for Congress a false and malicious article representing the plaintiff as saying that he would not propose to go into a debate on the tariff differences on wool, quinine and all the things because he, the plaintiff, wasn't built that way. In reversing the judgment of the lower court which sustained a demurrer to the declaration, the court, at page 591, said:

“The innuendo says that defendant meant that plaintiff was too ignorant and imbecile to discuss the question, or to express in a decent way his intention not to discuss it. The province of the innuendo is to explain and give meaning to ambiguous language. If extrinsic evidence is required to ascertain its meaning the jury must determine that question. *Bourreseau v. Journal Co.*, 63 Mich. 425.

The meaning of these words as used in the context is certainly not clear. The demurrer for the purposes of this case admits both the meaning supplied by the innuendo and the malice charged. When all the facts are placed before the court and jury upon the trial, the question whether or not the publication was libelous will be presented for their determination. The declaration makes out a case proper to be submitted upon the facts which may be shown by the evidence.”

It is submitted that the case at bar is even stronger than the *Belknap case*, *supra*, and the meaning of the utterances with which we are concerned are even more clearly susceptible of a slanderous meaning.

In the case of *Washington Herald Company v. Berry* (41 App. D. C. 322) at page 340 it is said:

“We agree with the learned trial justice that the words published were susceptible of a meaning

that would hold the plaintiff up to public contempt and ridicule and disgrace. The charges that he was a 'disgruntled fanatic', had been deposed from office; and that he was getting off easy when he was simply deposed and nothing more was said concerning the manner in which he had filled the office of Chief of the Division, were susceptible of a meaning that would reasonably bring the plaintiff into ridicule and contempt, and injure his standing in the community. But the court did not direct the jury that the article was libelous *per se* as matter of law; but left it to them to find whether the reading public would interpret that language as they read the article in connection with the context published, in that way; and if they found that it would not be so commonly understood they should find for the defendant. Notwithstanding the statement of the court that the words were susceptible in law of a defamatory meaning, it was left to the jury to say whether, as a matter of fact, the readers of the article would, under the circumstances attending the publication, have so understood them."

If such a statement as contained in the *Berry case*, *supra*, was held to be susceptible of a libelous meaning, then it is respectfully submitted that in the case at bar, where it is specifically alleged that the words concern the plaintiff in relation to his business or trade and affect his credit and reputation in such business, the utterances must be held to be susceptible of a slanderous meaning and the question should be one for the jury.

In the recent case of *King Kullen Grocery Company, Inc. v. Astor, et al.* (291 N. Y. S. 488, Decided Nov. 30, 1936) the defendants published a statement concerning the plaintiff accusing the plaintiff of being a "price wrecker". The lower court sustained a motion to dis-

miss the complaint and on appeal the case was reversed as to some of the defendants. The court held:

“If a jury should say that the language justifies the vicious meaning as being the one intended to be conveyed, the publication is libelous per se. Where words are capable of more than one interpretation, the true sense in which they were meant is for the jury. If that sense be the vicious one for which plaintiff contends, *then the language adversely affects the integrity and good repute of the plaintiff business corporation.* It imports that it is a concern whose customers will find it unreliable and unsafe to deal with. The fact that it holds itself out to be a *price wrecker* does not mean that it holds itself out to be a price wrecker by dishonorable means. If it is a *price wrecker* or *cutter* by honorable means, no opprobrium may be attached to it with impunity by such a publication as that of which complaint is made, if a vicious meaning be found by a jury to be the one intended. *First Nat. Bank of Waverly v. Winters*, 225 N. Y. 47, 121 N. E. 459; *Samson United Corporation v. Dover Mfg. Co.*, 233 App. Div. 155, 251 N. Y. S. 466; *Sullivan v. Daily Mirror, Inc.*, 232 App. Div. 507, 250 N. Y. S. 420; *Kloor v. New York Herald Co.*, 200 App. Div. 90, 192 N. Y. S. 465. * * *” (Italics ours)

If the words “price wrecker” can be held susceptible of a libelous meaning then, it is submitted that the statements made by the defendants concerning the plaintiff that he has been *cutting prices* to any garages, fleets or dealers, that he has been buying merchandise from jobbers and reselling below cost just to hold the business, and that various Washington jobbers have cut the plaintiff off on an Open Account Basis and that various Washington jobbers have refused to sell mer-

chandise to the plaintiff, must clearly be held to be susceptible of a slanderous meaning. Not only is the plaintiff accused of cutting prices and other unfair and unethical trade practices, but the defendants maliciously and falsely accused the plaintiff of being *unable to obtain credit and unable to purchase merchandise for his business from various jobbers.*

It is for the jury to say whether or not the words used by the defendants in this case are susceptible of a slanderous meaning. The declaration plainly sets forth that the defendants falsely or maliciously used the language in order to affect the integrity and good repute of the plaintiff in his business, and by reason of the fact that the defendants sought to induce others to cease doing business with the plaintiff, it can be safely stated that the defendants meant that those customers would find the plaintiff unreliable and unsafe to deal with by reason of his inability to obtain credit and because of the unethical and unfair methods that the plaintiff employed in conducting his business.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the court below in sustaining the demurrer to the declaration should be reversed.

Respectfully submitted,

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Of Counsel.

FILED OCT 11 1937

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IN THE
**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1937.

No. 6975

GEORGE MEYERSON,

Appellant,

vs.

**W. D. HURLBUT, AND AHLBERG BEARING COMPANY,
A CORPORATION.**

Appellees.

BRIEF FOR APPELLEES.

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STATEMENT.

This action was instituted in the District Court of the United States for the District of Columbia to recover damages alleged to have been suffered because of allegedly slanderous statements made concerning the appellant by the individual appellee as agent of the corporate appellee. The declaration was in two counts and no special damage was alleged in either.

The appellees demurred to both counts of the declaration (R. 9), and upon hearing the demurrer was sus-

tained (R. 10). The appellant elected to stand upon his declaration, judgment was entered for the appellees, and appeal therefrom taken to this Court (R. 10).

The allegedly slanderous utterances in each count of the declaration (R. 3 and 6) are substantially the same, the chief difference being that the utterances in the respective counts were made at different times and the utterances in the first count are in the third person, whereas those in the second count are in the second person.

The appellant filed a bill of particulars to his declaration (R. 8), by which it appears that the utterances in the first count were made on one occasion and in the same conversation and that the utterances in the second count were also made on one occasion and in the same conversation.

The substance of the allegedly slanderous utterances is that the appellant had been cutting prices on merchandise he was selling and had been re-selling his merchandise below cost for the purpose of holding business, and that the Washington jobbers in his merchandise had cut him off on open account basis and refused to sell him merchandise.

By innuendoes it is sought to show that these utterances meant that the appellant was guilty of unfair and unethical trade practices and that his customers were not dealt with fairly and ethically and that the appellant was unable to purchase merchandise for his business on a credit basis. It is also asserted in the innuendoes that these alleged utterances meant that the appellant practiced "cutthroat competition" or "chiseling" in order to retain his trade and to gain trade and customers from other competitors.

There were no allegations by way of inducement to

show that the utterances in question had local or other meaning than that which was implied by the words themselves.

QUESTIONS INVOLVED.

There is really only one question involved in the case, namely, are the utterances alleged in the declaration slanderous *per se*. Appellant seeks to demonstrate that the alleged utterances have a two-fold effect, one to impute to him improper business methods, and the other to impugn his credit. It is submitted that this is an unsound approach, in view of the fact that the utterances were made on one occasion in the same conversation (R. 8), and because the words uttered do not, in any real sense, cast any doubt upon the appellant's financial standing.

ARGUMENT.

THE UTTERANCES ARE NOT SLANDEROUS PER SE.

Reading the allegations of the declaration with the statements in the bill of particulars (R. 8), it appears that substantially what the appellees are alleged to have said was that the appellant was cutting prices on his merchandise to secure business, and because he was doing that jobbers had cut him off on an open account basis and had refused to sell to him. It is well settled that when it is sought to demonstrate that utterances are slanderous or libelous, the entire statement must be read together and not separated into parts. The purpose of this is to secure the meaning of the words as they are heard by others. In *Donaghue v. Gaffy*, 53 Conn. 43, the defendant published a statement in which he asserted that because he had ceased to purchase merchandise from the plaintiff, the plaintiff had gone to his landlord and offered more rent for the premises which the defendant rented, thereby securing a lease for the premises. The allegedly libelous statement characterized this conduct of the plaintiff as "mean and unfair" and as "foul and unfair dealings" and as "base treachery." The court held that the publication was not libelous *per se* merely because certain conduct of the plaintiff was characterized in strong language. The Court said:

"All parts of the paper should be read in connection to collect the true meaning. If so read, the severe epithets applied to the plaintiff lose all their force except as they attempt to characterize a single transaction, which is manifestly referred to as the sole foundation for the statements made. That transaction, or 'experience' as the circular calls it, clearly shows that the epithets—'base treachery' and

‘foul and unfair dealings’ are not to have their ordinary meaning.”

So in the case at bar, the entire utterance must be considered and not separate parts of it. When this is done, the real statement which the appellee is alleged to have made is seen to be that the appellant cut prices, and because he cut prices jobbers refused to sell merchandise to him on open account. Considered as one statement, as the bill of particulars states it is, it is quite clear that there was no charge made by the appellee impugning the solvency or general credit of the appellant. No one hearing the statement made would understand that the appellant’s financial condition was bad or that it was unsafe to deal with him because he could not pay his bills. Taken in their real sense, the words meant simply that jobbers refused to sell to appellant because he cut prices, *not* because his credit was bad.

In every utterance from which some one might infer that one’s credit is bad, which is libelous *per se*, the words uttered must reasonably impute such lack of credit. This is demonstrated by the facts in *Woodruff v. Bradstreet*, 116 N. Y. 217, in which a suit for libel was brought because of the publication that a judgment for \$4,000.00 had been obtained against the plaintiff, the contention being that this was a reflection upon plaintiff’s credit and gave rise to an inference that the plaintiff did not pay his debts. In holding that the statements were not libelous *per se*, the Court said:

“The recovery of a judgment does not necessarily import conceded default in payment of debt. It is a matter of frequent observation that controversies apparently arising out of an honest difference of opinion, go into the courts for determination. Litigation also not infrequently comes from causes in which is involved no personal credit or default and there is no presumption in that respect upon the subject in and of the action.

“The meaning of words in an action of slander or libel cannot be extended by innuendo beyond their import, aided as they may be by extrinsic facts with which they are connected.

“The information sought to be given by the report was that a judgment had been recovered against the plaintiff for the amount, and, as the consequence, he was charged by it with liability to that extent. That was what the defendant’s subscribers were permitted, from its report, to understand had occurred. It might or it might not make inquiry, preliminary to further credit, desirable. That might depend upon the known or unknown pecuniary ability of the party. In its relation to parties generally such would be the uncertainty of its effect. And it is the rule in its general application and effect, as to all persons in the class before referred to, that is now under consideration, because the publication of such a statement when untrue is libelous *per se in all such cases* or in none. The fact that in some cases it might result in the denial of credit, and otherwise be injurious to a party represented to be charged with liability by judgment, does not necessarily require the conclusion, as a matter of law, that the publication was in itself defamatory.

“But in such case the party would be entitled to his remedy, supported by special damages alleged as the consequence of the false publication.”

The question then becomes whether or not a statement that a person cuts prices to get business is in and of itself slanderous, that is to say, slanderous *per se*.

Only one case has been found where the character of a charge of cutting prices was considered. In *Willis v. Eclipse Manufacturing Company*, 81 App. Div. (N. Y.) 591 (First Department), the plaintiff was charged by the defendant in a letter with “cutting” prices on a certain bicycle. The defendant complained in the letter that this action of the plaintiff not only injured defendant’s business but the trade in general and those jobbers who maintained the contract price. By innuendo it was al-

leged that the statement in the letter meant that the plaintiff had violated a contract and was an unsafe and unreliable person to deal with. The Court held that the utterance as to cutting prices was not libelous *per se* and the meaning could not be enlarged by innuendo. The Court said:

“It is evident from a reading of the letter complained of that the innuendo expands the meaning of what is charged in that letter far beyond any reasonable intendment that can be drawn from it:”

Another case more recent deals indirectly with charges of price cutting. In *Shaw Cleaners and Dyers v. Des Moines Dress Club*, 215 Iowa, 1130, the alleged libelous publication was in part:

“When you buy cleaning for half price you get just what you pay for * * * half way cleaning and pressing.”

The plaintiff alleged that it was the only concern that advertised that it would do work at half price. Assuming that the utterance was made concerning the plaintiff, the court held upon demurrer that the utterance was not libelous *per se*. This decision was affirmed upon appeal, the court saying:

“In determining whether language is libelous *per se*, it must be viewed stripped of any pleaded innuendo. The meaning of the phrase ‘*per se*’ is ‘taken alone, in itself, by itself.’ *Words which are libelous per se do not need an innuendo, and, conversely, words which need an innuendo are not libelous per se.*” (Italics supplied.)

Another case in which the question indirectly arose as to whether utterances charging price cutting are libelous is *Achorn and Company v. Piper*, 66 Iowa 695, in which the court held that the utterances were not libelous *per se*. In that case the court described the libelous publication as follows:

“The alleged libelous publication, which is the

foundation of the action, charges substantially that plaintiffs, who are dealers in and purchasers of grain, combined to reduce the price of grain, one of the plaintiffs purchasing one day and another the next, and so on, and that the price of grain at the town where plaintiffs were doing business was less than at the other neighboring towns."

The appellant cites as supporting his contentions the case of *King Kullen Grocery Company v. Vincent Astor, Raymond Moley and Today Associates, Inc.*, 291 N. Y. S. 488, decided by the New York Appellate Division, Second Department. The opinion in that case is *per curiam*, is very short and the facts in the case are not set forth in any detail. It does not even appear how the question decided arose. It appears that the libelous publication concerning the plaintiff was that he was a "price wrecker." While the opinion is very inadequate, it seems to appear that there were allegations by way of inducement in the pleadings showing that the alleged utterances possessed a special meaning under the circumstances. In this situation the court simply held that the cause should have been presented to the jury. Unless the New York decisions are to be held as out of line with the great weight of authority, this must be the case, since, as will be hereinafter demonstrated, the question as to whether words in and of themselves are libelous is one for the court.

The absence of any charge of moral obloquy in an utterance in which one is charged with price cutting is demonstrated by another type of decision. Under Section 45 of Title 15 of the United States Code, the Federal Trade Commission has authority, after proper hearing, to issue orders directed to parties requiring them to cease and desist from conduct which constitutes an unfair method of competition. In *Sears, Roebuck and Company v. Federal Trade Commission*, 258 Fed. 307, the

Circuit Court of Appeals held that a finding by the Federal Trade Commission that the respondent corporation had sold its merchandise below cost was not a finding of unfair competition and directed that so much of the cease and desist order of the Commission as forbade such practice be modified. The Court said:

“We find in the statute no intent on the part of Congress, even if it has the power, to restrain the owner of property from selling below cost, and we find in the statute no intent on the part of Congress, even if it has the power, to restrain the owner of property from selling it at any price that is acceptable to him, or from giving it away.”

To accuse one of cutting prices or of selling below cost is not to state that one is guilty of any improper conduct or of conduct which will hold him up to scorn, ridicule or contempt. Price cutting is a common practice, as is also selling below cost. There is no moral or other obloquy involved in selling what is one's own for whatever he chooses to sell it for. It is such a common practice for merchants to sell a particular article below cost in order to draw trade to their stores, so that other articles might be purchased, that the Court will take judicial notice of the practice. These articles are commonly called “leaders.” Certainly no store that indulges in this common practice would consider its motives impugned if it were accused of the practice.

By extended innuendo, the appellant seeks to broaden the meaning of the words uttered. The general import of the innuendoes is that the charge of price cutting constituted a charge of unfair and unethical trade practices and that appellant's customers and trade were not dealt with fairly and ethically.

It is difficult on the face of it to understand how charging one with price cutting could constitute a charge of dealing unfairly with one's customers. It is almost as

difficult to understand how a charge of price cutting could, in and of itself, constitute a charge of unfair and unethical trade practices.

It is a well settled law in this jurisdiction, and it is the great weight of authority, if not the universal holding, that the usual and accepted meaning of words may not be extended, in a suit for damages because of their utterance, by innuendo. If the words have a local meaning, or the surrounding circumstances give them a meaning other than they appear to have by common acceptance, the facts concerning such peculiar meaning must be alleged in the inducement in the declaration. This extraordinary meaning cannot be furnished by allegations by way of innuendo.

In *Warner v. Baker*, 36 App. D. C. 493, the Court said:

"The innuendo is only essential to explain the meaning of the words used. It is well settled that words that are not in themselves actionable cannot be made so by innuendo, but must be aided by proper averment and colloquium. 'The office of an innuendo is often mistaken by pleaders. *It cannot extend the sense of the words spoken, beyond their own natural meaning, unless something is put upon the record, to which the words spoken may be referred, and by which they may be explained by the innuendo.*' *McCuen v. Ludlum*, 17 N. J. L. 12.

"It is the office of the inducement 'to narrate the extrinsic circumstances which, coupled with the language published, affects its construction, and renders it actionable; where, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously.' Townshend, *Slander & Libel*, 3d ed. sec. 308. The colloquium is a direct allegation that the language used was concerning the plaintiff, or referred to him and his affairs, or related to plaintiff and the facts alleged as inducement.

"If, however, the words are not defamatory per se, the defamatory meaning must be set out in the

inducement, and this meaning or application must appear by proper averment in the colloquium." (Italics supplied.)

In *Brinsfield v. Howeth*, 107 Md. 278, the Court, after holding that the words therein considered were not libelous *per se*, said (page 286):

"If the defendant by the use of language attributed to him meant to impute a want of chastity to the plaintiff an averment may be introduced that by a *local, or neighborhood understanding such words mean, or are understood to impute, the meaning ascribed to them by the innuendo.* Under such a declaration the plaintiff could prove 'any extraordinary, or peculiar meaning expressed by the words in question.' *Newbold & Sons v. Bradstreet*, 57 Md. 51. And could also prove in what sense the hearers understood the words. *Coldsborough v. Orem & Johnson*, 103 Md. 683.

"If the alleged defamatory words are not actionable on their face, but derive their defamatory import from extrinsic facts or circumstances, such extrinsic facts and circumstances must be set forth and connected with the words charged by a proper averment. *13 Ency. Pl. & Prac. 32.*" (Italics supplied.)

In describing the function of an innuendo the Maryland court in the same case had the following to say (page 284):

"If the declaration is not otherwise good, the *innuendoes* cannot make it good. They cannot add to, or enlarge the sense of the words used, and if the alleged defamatory words do not constitute slander in themselves, the innuendoes cannot enlarge or add to their legal meaning and effect. The innuendo is merely a form, or mode of introducing explanation, it serves to point out some matter already expressed, it may apply what is already expressed, but cannot enlarge the sense of the previous words. The legal effect of the innuendo is a question of law which arises under the demurrer. This Court said in *Lewis v. The Daily News Company*, 81 Md. 472: 'Upon de-

murrer it is always the province of the Court to determine whether the words charged in the declaration amount in law to libel or slander.' *Dorsey v. Whipps*, 8 Crill 462; *Haines v. Campbell*, 74 Md. 158; *Avirett v. The State*, 76 Md. 510. It is equally a matter of law as to whether an innuendo is good; that is to say, whether it is fairly warranted by the language declared on, when that language is read, either by itself, or in connection with the inducement and colloquium, if there be an inducement and colloquium set forth. *Avirett v. State, supra*; *Solomon v. Lawson*, 8 Q. B. 828.

"Mr. Chitty in his work on pleading, Vol. I, P. 400, states the rule to be that: 'If the libel or words do not *naturally* and *per se* convey the meaning that the plaintiff wishes to assign to them, or are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to show that they are actionable, it must be expressly shown that such matter existed and that the slander related thereto.' "

(Italics supplied.)

In *Labor Review Publishing Company v. Galliher*, 153 Ala. 364, a labor paper published the following of the plaintiff, who was a contractor:

"Carpenters Take Notice. At a recent Meeting contractors are placed on Unfair List. The Labor Review has been handed the following, with instructions to publish and keep standing until the parties named have decided to set themselves square with organized labor: 'To the Labor Review: The following contractors have been placed on the unfair list by the Carpenters' Union No. 376, towit: J. W. Galliher, etc.' "

There was an innuendo which alleged that these words imputed that the plaintiff "was dishonest and unreliable and undeserving of the confidence of the public in his avocation." The Court held that the innuendo was not warranted by the usual meaning of the words and that the words were not actionable *per se*.

As was said in *Shaw Dry Cleaners and Dyers v. Des Moines Dress Club*, *supra*:

“Words which are libelous *per se* do not need an innuendo, and, conversely, words which need an innuendo are not libelous *per se*.”

It is thus clear that whether the utterances alleged in the case at bar are libelous *per se* must be determined by an examination of the words standing alone, unaided by any innuendoes. It has been demonstrated that a mere statement that one cuts prices does not impute improper conduct. It has also been shown that reading the alleged slanderous utterances as one statement, as it must be read since it was made in the same conversation at the same time (R. 8), there was no imputation of lack of financial worth or of insolvency. All that was said was that the appellant cut prices and undersold his competitors and for that reason the jobbers refused to deal with him on an open account basis and refused to sell to him. By no stretch of the imagination can such words be considered slanderous *per se*.

The vicious effect of holding that utterances as innocuous as the ones under consideration are slanderous *per se* will be understood when it is considered that if these words are held libelous *per se* the case may go to the jury, if their utterance is proved, without any evidence or proof of damage whatsoever, and the Court must charge the jury that it is for them to find how much the plaintiff was damaged. Each count of the declaration asks damages in the sum of \$25,000.00, or a total of \$50,000.00 damages. While the size of the amount of damages for which prayer is made in a case of this character is rarely to be taken seriously, it is, nevertheless, true that a jury is left in a large measure to guess at the amount of damage. This is not a case where seri-

ous charges have been made against the character of a person. The sole basis on which damage is sought is that the words uttered must, in and of themselves, have damaged the plaintiff's business. How much that damage is does not appear, and if the words are held to be slanderous *per se*, the jury must be left to guess as to such damage. It is submitted that both on the authorities and in reason the utterances here involved are not slanderous *per se*.

The judgment of the District Court of the United States for the District of Columbia should, therefore, be affirmed.

Respectfully submitted,

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October, 1937.

